Whistleblower Protection · newsletter

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INTRODUCTION

On December 16th, 2019, the EU Whistleblower Directive 2019/1937 (hereinafter: the Directive) into force. The directive will have a significant impact, especially for employers. The directive aims to introduce a uniform minimum EU-wide protection for so called whistleblowers and to improve the detection of violations of European law. The development of the directive has been driven, inter alia, by the ineffectiveness of existing reporting mechanisms in organizations, which discourage whistleblowers and stimulate them to remain silent, even though they are vital for maintaining an open and transparent society, as they expose misconduct or hidden threats. Employers and employees are well advised to inform themselves about the implications of the Whistleblower Directive.

The Whistleblower Directive only covers the reporting of violations of certain European legal acts listed in the annex to the Directive. This includes, for example, reports of violations of procurement law or violations of product safety regulations. Reports of violations of data protection, environmental protection or consumer protection regulations are also covered. In contrast, the directive does not cover reports of violations of national laws that do not originate in a European directive. However, the EU encourages national legislators to extend the scope of the Whistleblower Act to be implemented until December 17th, 2021 also to violations of national law.

The personal scope of the directive is broad. According to the directive, not only employees but also, for example, officials, self-employed persons, shareholders and members of a management or supervisory body of a company are eligible as whistleblowers. Furthermore, so-called facilitators, for instance third parties connected with whistleblowers (e.g., colleagues or relatives of the whistleblower) as well as legal entities owned by the whistleblower, are also to be protected from reprisals. Facilitators are persons who confidentially assist a whistleblower in making a report in a professional context. It should be noted, however, that the directive is intended to protect only bona fide persons. Thus, a person is only considered to be a whistleblower if there was reasonable cause to believe that the reported information about violations was true at the time of the report and that such information fell within the scope of the directive. If, on the other hand, a person intentionally or grossly negligently reports false information, there is no protection under the Whistleblower Directive.

If an employee learns of unlawful conduct on the part of his or her employer, the European Court of Human Rights has so far ruled that internal clarification has priority. This means that the employee, due to his duty of loyalty, restraint, and confidentiality, is obligated to first contact the employer and address the issue. Only if this attempt fails or waiting cannot be reasonably expected, he may turn immediately to external third parties. If he fails to do so, he may face consequences under labor law, in particular dismissal. This is now changing because of the Whistleblower Directive. If a whistleblower wishes to disclose a violation of European law by another party, he can in future, at his discretion, first report the matter internally, for instance to a suitable body within the organization, or directly externally to the competent authority. However, a publication or making information about violations publicly available (e.g., involvement of the press or publication on the Internet) remains the ultima ratio, unless the whistleblower must expect reprisals or there is little chance that effective action will be taken against the reported violation. Otherwise, publication will only be permissible if no appropriate action has been taken in response to the whistleblower's report within three or six months.

Besides that, the Whistleblower Directive stipulates that a whistleblower must be protected from reprisals and that they should not be able to be held liable. Another significant deviation from the current legal situation is that in future the burden of proof will be reversed in favor of the whistleblower. If a whistleblower suffers a disadvantage (e.g., a dismissal) after making a report, it will be presumed that the disadvantage constitutes reprisal and must therefore be invalidated / set aside.

Furthermore, the Whistleblower Directive is intended to ensure an effective reporting infrastructure in the future. Legal entities with more than 49 employees are therefore required to establish internal reporting channels through which employees can report information in written or oral form. Legal entities with 50 to 249 employees must set up an internal reporting channel no later than December 17th, 2023 and will the opportunity of setting up a joint reporting channel with other companies of the same size with up to 249 employees. On the other hand, there is no provision for the possibility of setting up a central reporting channel for all companies of a group irrespective of the number of employees in the individual group companies.

The reporting channels to be set up can be operated internally by a person or department designated for this purpose. However, it is also possible for the reporting channel to be provided via an external party. The reporting channels to be set up must meet certain minimum standards. These include that the confidentiality of the identity of the whistleblower and third parties mentioned in the report is maintained and that unauthorized employees are denied access to the report. The whistleblower must be sent an acknowledgement of receipt within a period of 7 days. Furthermore, the reporting system must provide a reasonable timeframe for feedback to the whistleblower, which must be provided within 3 months of receipt of the report.

In the following article, we provide a practical overview of how and to what extent the Whistleblower Directive has been implemented in the individual European states of our practice group. In addition, we shed light on what employers and employees will have to observe in the future in the individual member states. Members of our practice group based outside the European Union provide an overview of whether and, if so, how whistleblower protection is provided in their countries.

CONTENTS

ALBANIA

The Whistleblower Directive has not been transposed into national law in Albania, as Albania is not currently an EU/EEA member. Currently, whistleblowing is regulated under Law No. 60/2016 ("Whistleblowing Law") which establishes mechanisms for the protection of whistleblowers and obligations for public/private entities vis-à-vis whistleblowers.

One of the principles related to whistleblower protection is the protection of confidentiality. Although normally a whistleblower should provide his/her name and contact information in any report, the Whistleblowing Law permits the submission of an anonymous report, where the whistleblower can justify the need for anonymity and the report contains sufficient information to begin an investigation. During the investigation, the whistleblower's identity may not be disclosed to third parties without their written consent. Information relating to the report is confidential and may not be shared with, or transmitted to, internal or external third parties without the written consent of the whistleblower, unless disclosure is required to fulfil a legal obligation. As per the law, whistleblowers must be protected from any act of retaliation, such as dismissal or suspension from their work position, the transfer inside or outside the organization, relegation, decrease in the salary or other financial privileges, the loss of status and privileges, refusal of promotion, negative evaluations, etc. Any act of retaliation against a whistleblower is considered null and void. Whistleblowers must be provided with the option of transfer in case they choose to not return to the same workplace and to relocate to another place in order to protect themselves from hostile reactions.

Under the Whistleblowing Law, an investigation must be, barring special circumstances, concluded within 60 days of commencement of the investigation. The whistleblower may request information about the progress and results of the investigation, which must be provided within 30 days of receipt of the written request. In any event, the whistleblowing unit must notify the whistleblower about the status and, if applicable, of the results of the investigation within 30 days from the moment the report was made.

Under the law, the whistleblower is entitled to whistle-blow on the corruption and bribery practices he becomes aware during his employment with the responsible unit within the organization or with the High Inspectorate of the Declaration and Control of Resources and Conflicts of Interest (the "ILDKPKI"), as appropriate. The provisions of the law on the protection of the whistleblower are applicable in both scenarios. However, the Whistleblowing Law provides reporting obligations, which require the internal whistleblowing units to file an annual written report with the ILDKPKI, describing any investigations of whistleblower complaints in the preceding year.

Whistleblowers are not protected in terms of reporting of violations of European Union law, but with respect to reports concerning anticorruption practices. Under the Whistleblowing Law, the scope of the reported violation has to be limited to anti bribery and corruption practices. The law clearly provides that it aims to prevent and attack corruption in the public and private sector as well as offer due protection to whistleblowers. However, many forms of corruption practices involve the violation of laws (such as counterfeit, contraband, smuggling, etc.). Therefore, if the above violations are the result of a corruptive practice, such topics may be included in the ABC practices.

Under the Whistleblowing Law, private companies with more than 100 employees and public authorities with more than 80 employees must establish an internal whistleblowing unit, composed of one or more employees, which is responsible for the examination of whistleblower reports and the protection of the whistleblowers. Failure to comply with the obligation to set an internal whistleblowing unit may be subject to a fine of 100 000 ALL (approx. 820 EUR). Any act of retaliation against the whistleblowers undertaken by the private or public entity, may be subject to a fine in the amount of 300 000 ALL (approx. 2500 EUR) up to 500 000 ALL (approx. 4100 EUR). In addition, the breach of the obligation of confidentiality may be subject to a fine of 150 000 ALL (approx. 1230 EUR) up to 300 000 ALL (approx. 2500 EUR). The above fines are imposed by the ILDKPKI, which under the Whistleblowing Law, is the competent body for external reporting.

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The Whistleblower Directive has not been implemented in the national legislation since Bosnia and Herzegovina (B&H) is not EU/EEA member. However, legal protection of whistleblowers in B&H encompasses three laws and three different models of protection of whistleblowers: Law on the Protection of Persons Reporting Corruption in the Institutions of Bosnia and Herzegovina (B&H level), Law on the Protection of Persons Reporting Corruption in the Republic of Srpska (entity level) and Law on the Protection of Persons Reporting Corruption in the Brčko District of Bosnia and Herzegovina (district level). The entity of Federation of Bosnia and Herzegovina does not have such a specialized law, but offers protection through other laws, such as criminal law for example.

The B&H level law refers to employees in the institutions of B&H and legal entities that establish these institutions, while the second and third law refer to all persons and legal entities who in good faith report corruption in the public or private sector in the Republic of Srpska / Brčko District. In fact, all three regulations predict that the report must be filed in good faith or in good intention, which is intended to prevent the protection of those who do not act in such intention / faith.

In addition to this similarity, these regulations differ in many ways, even in the most basic definitions. The law at the B&H level provides a significantly broader definition of corruption in relation to the other two laws, which, even though it refers to a limited scope of people (employees of state institutions and state legal entities), extends protection to much more diverse phenomena and forms of corruption, such as “violation of the laws and other regulations, as well as all irregularities in work and fraud which indicate the existence of corruption.” On the other hand, the Republic of Srpska law effectively limits corruption to the quality of the crime, giving a much more restrictive definition that takes abuse of official authority or official position for private purposes as a criterion, thus narrowing the seemingly broad protection that extends to both the public and private sectors. In that regard, Brčko District law seems to be somewhere in between, in the sense that, similar to B&H level law, and unlike the entity level law, it offers a somewhat wider description of corruption, so that it in particular may include direct or indirect requesting, offering, giving or accepting bribe or some other illicit advantage, or the possibility of it, thereby violating appropriate performance of any duty or conduct expected of the bribe recipient.

The main difference between the three currently valid regulations in B&H is that they provide completely different models of legal protection. When it comes to the external protection, the state law offers external protection through a specialized body, ie. The Agency for the Prevention of Corruption and Coordination of the Fight against Corruption (APIC), which is authorized to grant the status of whistleblower at his request, but also to eliminate the consequences of harmful actions. Similarly, the Brčko district law also predicts the establishment of specialized body, ie. Office for the Prevention of Corruption and Coordination of the Activities on the Suppression of Corruption. On the other hand, Republic of Srpska law defines “external protection” in a completely different and narrower way and directs whistleblowers to a judicial protection model by filing a lawsuit at the competent court. Therefore, all regulations standardize internal protection as a way of reporting corruption to the employer, but in place of external mechanisms and methods of protection, different models emerge. All are linked with the intention of eliminating the harmful measures or reprisals that are most often suffered by whistleblowers (mobbing, establishing a hostile environment after filing a report, disciplinary punishment etc).

Furthermore, all three laws differentiate internal and external report made by the whistleblower, where internal report similarly refers to the report made to the employer (or authorized responsible person), while external reporting is defined differently. In that sense, the Republic of Srpska law defines that by external report, the whistleblower informs the internal affairs bodies, the prosecutor’s office or civil organizations dealing with the protection of human rights and the fight against corruption, about the facts based on which he suspects that corruption has been attempted or committed. No possibility of public disclosure of corruption is proscribed by the entity level law.

On the other hand, the state, and the district level law allow possibility of public disclosure as a special form of external reporting. In that sense, these two laws identically define a special form of protected reporting as making a public disclosure or otherwise making information which indicate corruption publicly available, provided that the whistleblower suspects the following:

- that he will be exposed to harmful measures by a certain person, or
- that in the case of reporting to the employer (or other authorized persons), the adequate action will not be taken, or that evidence and information will be concealed or destroyed, or
- that the same information has already been reported to the employer (or other authorized persons), and the adequate measure has not been taken within the legal deadline according to the criminal, civil and administrative law, whereby, the whistleblower is obliged to consider any damage that may arise by his report, before performing special form of protected reporting.

In Republic of Srpska the Republic Administration for Inspection Affairs supervises is authorized for the supervision of the execution of the obligations of the responsible person in the procedure of internal and external protection, upon application or ex officio. The authorized inspector shall initiate misdemeanor proceedings in accordance with the provisions of the Law on Misdemeanors when he determines the misdemeanor prescribed by the provisions of this Law. In the state level it is proscribed that the supervision over the implementation of this law is performed by the Administrative Inspection of the B&H Ministry of Justice and the Agency for Prevention of Corruption and Coordination of the Fight against Corruption, each within its own jurisdiction. If the administrative inspector during the inspection determines the existence of a violation, issues a misdemeanor warrant in accordance with the Law on Misdemeanors of B&H, where fines can go up to 20,000 BAM (approx. EUR 10.000,00) In Brčko District the supervision is performed by the Administrative Inspection of the District Government, and exceptionally, Judicial Commission of Brčko District. If the administrative inspector determines the existence of a violation, issues a misdemeanor warrant in accordance with the Law on Misdemeanors of Brčko District, where fines can go up to 3,000 BAM (approx. EUR 1.500,00). Summa summarum, the administrative method of protection at the state and district level includes the possibility for the administrative inspector, who is also responsible for supervising the implementation of the law, to issue a misdemeanor order to the head of the institution if he does not follow the instructions of APIC, while unlike that, Republic of Srpska limits external protection through regular court proceedings.

BULGARIA

The Directive is not implemented in the Bulgarian National legislation yet. Parliamentary and president elections were held in Bulgaria in November 2021. Thus, there was a long procedure for constitution of the latest Bulgarian National Assembly and this specific political situation had a great impact on the legislative initiative in Bulgaria. As of the present date there are no legislative actions planned towards the transposition of the Directive and therefore it can be safely assumed, that the transposition deadline - December 17th, 2021, will not be met.

In Bulgaria are no present legislative acts, providing special protection to the whistleblowers and this kind of legal regulation is new for the Bulgarian national law.

The legislative process in Bulgaria includes a preliminary stage, where the proposed new legislative act is presented for public dispute. On October 18th, 2021 the Bulgarian Ministry of Justice published a very raw draft of suggested new "Protection of the People, Who Submit Signals and Publicly Disclose Information About Violations Act", which aims to transpose the Directive on Whistleblowing. The suggested draft consists only of the structure of the future act and outlining of its specific aims, as set by the Directive, but no actual texts. Nevertheless, the public was invited to provide suggestions and opinions, where such were submitted by the Supreme Bar Council, legal professionals, NGOs, etc. However, no further actions have been taken by the competent authorities so far.

Now, there is no unified or general regulation regarding the protection of persons or entities, who wish to disclose information on violations of the national or European law. Many specific acts in Bulgaria include guarantees for people, who submit signals. However, these guarantees are not supported with specific measures and therefore are general. Furthermore, the established principle in Bulgaria is that anonymous signals are not admissible for review by the notified authority.

It is worth mentioning that the Bulgarian Protection Against Discrimination Act (the PADA) and its final provisions provide a legal definition of the institute of "persecution": "a less favorable treatment of a person who has taken or is supposed to take any further actions in defense against discrimination acts". The PADA does provide more detailed protection and measures against persecution, but these measures and protection are limited to violations of the PADA only.

A lot of other national acts also provide for some protection of persons, who submit signals, namely special acts, which regulate specific public sectors (e.g., public procurement), but the protection is general and does not include specific measures or procedures.

Since Bulgaria does not have a specific legislation providing for similar protection as the Directive on Whistleblowing at the present date, our legal analysis hereunder will be based on the reported public consultations and the submitted proposals published by the Bulgarian Ministry of Justice.

The non-binding recommendations given by the Supreme Bar Council suggest broader application of the legal protection for whistleblowers in addition to just violations of the European Union law. The recommendation points out that any violations of the national law should be also included in the future legislative act, as the Directive provides for further extension of the applicability.

The Bulgarian Bar Council discussed furthermore, whether the applicability should be affecting only undertakings with headcount over 50 employees or not. Some recommend keeping the threshold as outlined in the Directive since this can lead to excessive administrative burden for the small business, while other recommend to aim towards universal applicability irrespective of the headcount.

Another important aspect of the new legislation, which many of the participants in the public consultations point out, is the admissibility of anonymous signals. The predominant opinion points out that anonymous signals should be admissible for review and assessed on the content and provided evidence (if any).

Furthermore, there Is no consensus which official body should be designated to control and monitor the rules of the new legislations. Some suggest that the competent authority should be the national Ombudsman, while others suggest that the competent authority should be the Bulgarian Commission on Data Protection, since a lot of the aspects of the new legislation are including personal data protection as well.

Finally, in the case of a rule violation, there is no consensus on the amount of the fine, nor on whether other measures should be imposed.

That's why, it is difficult to predict when the Directive will be transposed into Bulgarian law or when the corresponding legislative process will be completed. The same applies to the content of the laws. It is still uncertain whether the national legislation will only implement the mandatory requirements or whether it will go beyond the European requirements.

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The Whistleblower Directive has been largely implemented in the national legislation of the Republic of Croatia, but not in full. Namely, the current Act on the Protection of Reporters of Irregularities (OG 17/2019) entered into force on July 1st, 2019. therefore, a few months before the Directive (EU) 2019/1937. It seems that the legislator in the Republic of Croatia hastened to adopt this law, the text of which was drafted based on initial drafts and recommendations of the competent bodies of the European Union, and in the end, it turned out that this law is not fully consistent with the final text of the Whistleblower Directive. In view of the above, preparations are underway for the adoption of a new law, which will be fully aligned with the directive, and its adoption is expected soon.

Whistleblowers are not only protected in terms of reporting of violations of European Union law, but protection is set much wider. Namely, the term irregularity is defined by law as a violation of laws and other regulations and negligent management of public goods, public funds and European Union funds that pose a threat to the public interest, and which are related to doing business with the employer. Thus, acting contrary to any law or regulation may constitute an irregularity, regardless of the connection of that law or regulation with European Union law, and it can be said that the broadest possible protection of whistleblowers has been set in this context.

The whistleblower has the right to protection in accordance with the procedures for reporting irregularities provided by the same law (internal and external reporting and public disclosure), judicial protection, damages and protection of identity and confidentiality.

The internal structure that an employer must have in relation to reporting irregularities depends on the number of its employees. Namely, only the employer who employs at least fifty persons is obliged to establish by a general act internal reporting of irregularities and to regulate the procedure of internal reporting of irregularities and appointing a confidential person for internal reporting of irregularities. The said general act must be made available in an appropriate manner to all persons performing work for the employer. Such an employer must ensure the possibility of internal reporting of irregularities, appoint a trusted person for internal reporting of irregularities at the suggestion of at least 20% of employees employed by the employer, protect the whistleblower from harmful actions and take necessary measures to stop harmful actions and eliminate their consequences, as well as protect the data received in the report from unauthorized disclosure, unless this is contrary to law, and take measures to eliminate the identified irregularities. Furthermore, the employer is obliged to appoint a deputy of the confidential person at the proposal of the confidential person, and the confidential person must be an employee of the employer.

The procedure of internal reporting of irregularities begins with the submission of the report to a confidential person. The confidential person is obliged to receive the report of the irregularity and to examine it no later than sixty days from the day of receipt and to take without delay actions within its competence necessary to protect whistleblowers if the whistleblower made it probable that he is or could be a victim of harmful action due to reporting irregularities. It is obliged to forward the report of irregularities to the bodies authorized to act according to the content of the report if the irregularity has not been resolved with the employer. Furthermore, the confidential person is obliged to inform the whistleblower at his request, about the course and actions taken in the procedure and to provide him with access to the file within thirty days of receiving the report, then to inform the whistleblower about the outcome of the procedure immediately after its completion, and to inform in writing the competent body for external reporting of irregularities about the received reports within 30 days from the decision on the report. The confidential person is obliged to keep the identity of the whistleblower and the data received in the report from unauthorized disclosure or publication to other persons unless this is contrary to the law. The whistleblower does not have an unrestricted right to report irregularities externally, which is allowed under this law only in certain situations, for example, if there is no possibility of internal reporting of irregularities, if the whistleblower no longer works for the employer, if there is a well-founded fear that the whistleblower will be discriminated against. that he will not be protected in the internal reporting process.

Public disclosure of irregularities is the disclosure of irregularities to the public. A whistleblower may make public disclosures without prior internal or external reporting of irregularities, only exceptionally, if there is an imminent danger to life, health, safety or from the occurrence of large-scale damage or destruction of evidence.

An employer who does not implement this law in his business or does not protect whistleblowers in the manner prescribed by law may be fined up to HRK 50,000.00 (approximately EUR 6,600.00), and the responsible person of the employer may be fined up to HRK 30,000.00 (approximately 4,000.00 EUR). As noted above, if the employer has not established internal reporting of irregularities, the whistleblower can directly initiate external reporting.

The competent body for external reporting of irregularities is the Ombudsman. However, reports of irregularities may be submitted directly to the authorities authorized to act on the content of the report in accordance with a special law and established systems for detecting and dealing with irregularities.

CYPRUS

On the 20 January 2022, that the Cypriot House of Representatives voted into law the bill on the protection of persons who report violations of EU and national law and in particular possible acts of corruption ('the Whistleblowing Bill') that now transposes the Directive into national law.

The Minister of Justice & Public Order stated that employees in Cyprus who file complaints to the competent authority on a case-by-case basis will enjoy full protection, and no person will be subject to retaliation, such as dismissal, harassment, and a negative change in their working conditions.

Despite the fact that the said Directive has been transposed into national law, Cyprus law provides additional piecemeal protection in the fields of the civil service, corruption and bribery offences, competition law, and termination of employment, the Constitution of the Republic and has a range of laws that ostensibly provides some protection for employees in the public and private sectors, which step forward and report wrongdoings such as the Code of Ethics of the Public Services; the Labour Law; the Unfair Dismissal Law; the Civil Law Convention on Corruption and Supplementary Provisions Law of 2003.

The government of Cyprus has made some progress over the years in the fight against corruption, and one of them is the amendment to its Criminal Code in 2012, which provides the Criminal Law Convention on Corruption.Legal protections for government employees are more clearly defined than those in the private sector. Public servants are legally bound to report wrongdoings and are protected from any type of discipline by the Public Service Law. Barring urgent circumstances, government employees must make their disclosures in writing, seemingly reducing opportunities to maintain confidentiality. The 2013 Code of Ethics for Public Officials though, obliged public officials to report, not necessarily in writing, to their supervisory authorities any act of corruption which comes to their knowledge. The Labour Law requires objective grounds for dismissal of officials and the Civil Service Law provides for imprisonment or a pecuniary penalty for those who impose an unjustified punishment on a whistle-blower for reporting corruption.

In the private sector, the Unfair Dismissal Law offers vague guidance on protecting company employees from unfair treatment. If an employee reports a felony violation, this theoretically would outweigh internal company regulations; company's employees, however, must take care not to violate company regulations.

With the transposition of the Directive into national law, whistleblowers are liable for both violations of EU and national law. As an EU Member State and the supremacy of EU law, whistle – blowers should report violations both on an EU and on a national level.

Furthermore, there are no specific laid down regulations as to what exact structure an employer should have in place. However, bearing in mind the various national laws regarding employees, such as non-discrimination, protection of employment and so forth, some policies that could be put in place should at least provide for introducing and communicating the employer's policy on whistle – blowing, provide a forum for employees to report and discuss any issue internally, ensure that management will support the process and the employee, ensure that a thorough investigations take place, treat all information in strictest confidence and ensure that employees are not penalized. In addition to the remedies afforded to whistle-blowers in the Directive, it is possible to seek remedies in alternative laws as aforementioned. These laws include a specific sanction with regard to anyone imposing an unjustified punishment on a whistle-blower (who disclosed corruption) according to article 7 of the Civil Law. In addition, violation of article 7 of the Criminal Code (regarding whistle-blower protection) can result in being fined or sent to prison. The Civil Law Convention on Corruption of the European Council describes the same sanction for unjustified punishment of a whistle-blower for disclosing corruption.

As regards designated authorities to receive and give feedback, there is no overarching body/authority appointed to receive and investigate disclosures by whistle-blowers. Nonetheless, specific disclosures can be made to governmental hotlines, the Labour Department, the Public Service Commission, the Police and the General Audit Office of the Republic and now whistleblowers can also directly speak to the House of RepresentativesAs the law has yet to be officially published, the exact contents of the same is unavailable at the time of publication of this document.

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GERMANY

Whistleblowing and the proper handling of whistleblowers has been a media focus in recent years, due to the revelations of Edward Snowden or as well as the so-called diesel scandal in the German automotive industry. Despite the obligation to implement the Whistleblower Directive, the German legislator has not regulated the topic of whistleblowing in more detail. So far, only a draft law by the Ministry of Justice exists, but the former governing parties under the leadership of Chancellor Merkel could not agree on it. The main point of contention was whether the Whistleblower Directive would be implemented on a 1:1 basis only or - as provided for in the draft law - in an overshooting manner and would apply not only to the reporting of violations of EU law, but also to the reporting of domestic violations of law.

Even without the implementation of the Directive Whistleblowers should not be defenseless in Germany. After the deadline for implementation on December 17th, 2021, the (labor) courts will have to interpret the provisions of labor law in conformity with the Directive. In dismissal protection proceedings, this could lead to a dismissal being regarded as a prohibited measure in the light of the Whistleblower Directive and being declared invalid. Moreover, in the public administration sector employees should already be able to directly invoke the Directive as it should be sufficiently clear and unambiguous. The Directive is likely to apply to state institutions even if it is not specifically transposed into German law.

However, the protection of whistleblowers and the design of whistleblower systems have not yet been regulated by special legislation. An equivalent level of protection as in the Whistleblower Directive does not exist for whistleblowers under current law. According to the case law of German labor courts, internal clarification had priority. If employees learn of misconduct on the part of their employer and wish to report it, they had to contact their supervisor or employer first due to their duty of loyalty. Otherwise, they will be threatened with (extraordinary) dismissal and claims for damages by the employer. Only if the internal approach is unreasonable or impossible, or if no remedy can be expected within the company, the employee can, according to the current legal situation, immediately turn to an external body. Furthermore, employers are not obliged under current law to implement an internal reporting system for whistleblowers. However, this does not apply to credit institutions or insurance companies, which are already required to operate department-specific whistleblower systems.

Based on the German Corporate Governance Code there is a “recommendation” for listed companies to establish a whistleblower system. It states precisely: “Employees should be given the opportunity, in a suitable manner, to provide protected information about legal violations within the company”. Due to the fact that aforementioned provision is a recommendation, the companies concerned must implement the above-mentioned obligation or make public and explain any non-implementation (“comply or explain”) as part of the next declaration of conformity to be published annually. Ultimately, it is left to the individual companies to decide the exact intensity and manner in which the Code requirement is implemented.

The legislative project for the implementation of the Directive is expected to gain momentum again in early 2022 under the leadership of the new federal government. The coalition agreement of the governing parties’ states: “We will implement the EU Whistleblower Directive in a legally secure and practicable manner. Whistleblowers must be protected from legal disadvantages not only when reporting breaches of EU law, but also when reporting significant breaches of regulations or other significant misconduct, the disclosure of which is in the public interest. We want to improve the enforceability of claims for reprisals against the injuring party and are examining counseling and financial support services for this purpose.”

We assume that the new federal government will leave the previous draft law largely unchanged and pass it into the legislative process. According to the draft, employers with at least 50 employees as a rule must introduce an internal reporting system. For certain legal entities in the financial sector, this obligation exists irrespective of the number of employees (e.g., credit institutions, securities service providers, stock exchange operators, capital management companies). With regard to the reporting infrastructure to be set up by the employer, the current draft law provides that a person employed by the employer, an internal organizational unit (e.g., the compliance department of a company) or a third party (e.g., an ombudsman) may be entrusted with the tasks of an internal reporting office. However, the responsible persons must in any case be independent. The employer must ensure that there are no conflicts of interest. Furthermore, the employer must ensure that the persons in the reporting office are regularly trained for their tasks.

In addition to the establishment of internal reporting offices, input channels for the submission of reports must be created. The input channel does not have to be identical with the responsible reporting office. For example, central contact persons or persons of trust, a special mailbox, intra- or internet-based solutions or an external telephone hotline can be considered as input channels. However, both verbal reports and reports in text form must be possible. While access by the persons responsible for receiving and processing the reports must be always guaranteed, the reporting channel must also be designed in such a way that unauthorized persons cannot gain access and the identity of the whistleblower, and third parties remains protected.

Regarding the reporting procedure, the draft law provides for specific procedural steps. For example, the reporting office must confirm receipt of the report to the whistleblower after seven days at the latest and subsequently maintain contact while it checks the validity of the report. If the report proves to be valid, the reporting office must take appropriate follow-up measures (e.g. initiation of internal investigations, referral of the whistleblower to other competent bodies, transfer of the proceedings to the competent authority or closure of the proceedings for lack of evidence or other reasons).

To comply with the planned legal requirements, the draft law provides for numerous fine offences. The prevention or obstruction of a report or the imposition or threat of an unjustified reprisal (e.g. criminal proceedings or dismissal) by the employer can be punished with a fine of up to EUR 100.000.00, an intentional or negligent breach of confidentiality with a fine of up to EUR 20.000.00. In the event of unjustified reprisals, the whistleblower may claim damages from the employer.

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In addition to the reporting offices to be set up by employers, the Federal Republic of Germany is to establish an (external) reporting office at the federal level to which the whistleblower can turn directly without prior information to the employer. According to current plans, this external reporting office is to be established at the Federal Commissioner for Data Protection and Freedom of Information. In addition, all federal states may establish their own external reporting offices. Furthermore, the Federal Financial Supervisory Authority has special responsibility in the financial sector. For example, indications of violations of accounting regulations or stock corporation regulations must be reported to the Federal Financial Supervisory Authority.

Even without statutory implementation of the Directive, employers are well advised to already design their conduct guidelines and reporting systems in such a way that they meet the requirements of the Directive. In this way, the danger of liability could be effectively counteracted in the event of direct application of the Directive until the German Whistleblower Protection Act comes into force. The requirements of data protection and the works council's right of co-determination must be observed. If a works council exists, it has a right of co-determination pursuant to Sec. 87 (1) No. 1 BetrVG (conduct in the workplace). If an electronic system for reporting breaches of the Directive is to be introduced, there is also a right of co-determination under Sec. 87 (1) No. 6 BetrVG.

Cord Vernunft
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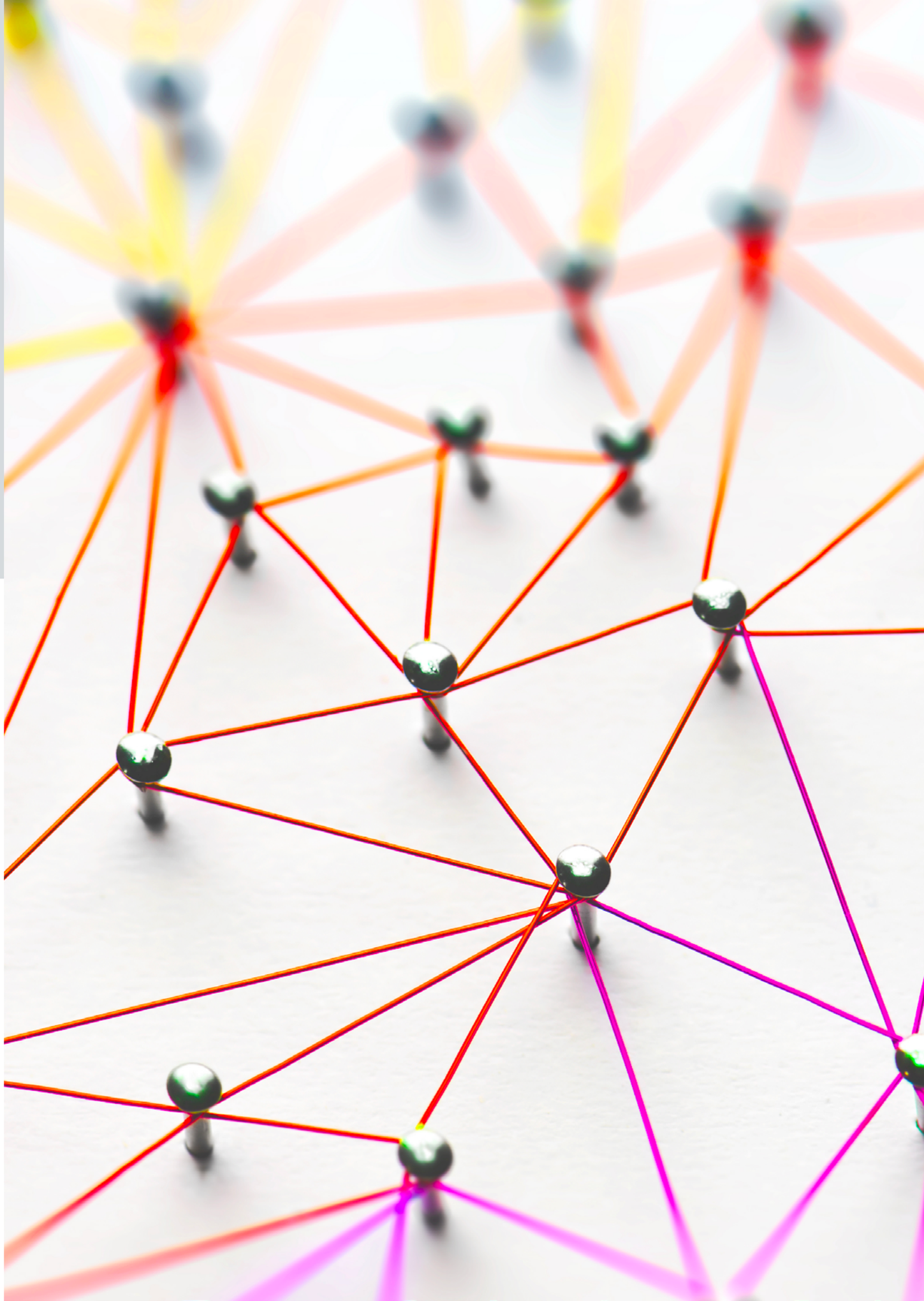

GREECE

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The term “whistleblower” was first introduced to Greece by the incorporation into Greek Law of the United Nations Convention against Corruption, by GRECO (Law 3560/2007), which was then incorporated by Law 4254/2014 in Article 45B of the Code of Criminal Procedure.

Until today, Greece has not yet implemented the EU Directive. The Ministry of Justice has established in May 2020 a special committee to prepare an impact assessment of the Directive and a draft bill to transpose it, but the status of the transposition process is not known, assuming that it will be delayed.

Currently, the most important legislation related to Whistleblowing in Greece is the Public Interest Witness Protection Law No 4254/2014. This law defined new guarantees to encourage the responsible provision of information to the competent authorities, as the concern about retaliation and criminal prosecutions is to date the most important deterrent for citizens who wish to contribute to the fight against corruption

In addition to this Law No 4254/2014 has introduced some measures which refer to the protection for violations of national law such as: protection from criminal prosecutions against them when filing a complaint or indictment for perjury, false accusation, violation of official secrecy or personal data. Moreover, even though there is not a general whistleblower protection mechanism in place, whistleblowers may qualify as witnesses acting in the public interest and this can be derived from alternative laws, namely article 45B of the Code of Criminal Procedure, article 9 of Law 2929/2001 and article 252/371 of the Penal Code. More specifically, public officials who proceed to the denunciation of corruption, receive protection against dismissal and they are not subject to any disciplinary procedure, punishment, or any adverse discrimination.

Regarding the reporting structure, the current legislative framework had not established specific reporting channels and therefore, the only obligation to report is derived from Article 40 of the Code of Criminal Procedure. According to this article, Greek citizens are required to disclose illegal actions to the Public Prosecutor or a responsible employee.

While this obligation covers the report of crimes by both public and private sector employees it does not specify any penalties for its breach and there are not any provisions to protect those who report in accordance with this reporting obligation. Practically, this means that under the current legal framework, the confidentiality of the whistleblower’s identity is not guaranteed. For example, the identity of the witness/whistleblower can be revealed in trial if the prosecutor orders to do so, according to the article 9 of Law 2929/2001, and in any case, the anonymity of the reporting is neither accepted nor prohibited by any legal provision.

Additionally, it is important to note that the current law does not provide any remedies for whistleblowers, and they would need to seek for remedies in alternative laws, such as the labor law. Finally, Greece has not appointed any overarching body or authority with the competence to receive, give feedback and investigate disclosures by whistleblowers.

In conclusion, we are expecting the national legal framework, which will implement the Directive, meeting the minimum standards required by it, and seizing the opportunity to bring the whistleblower protection in line with international standards and best practice. Additionally, companies have already started establishing a whistleblowing policy in order to comply with the new Directive, issuing a “Whistleblowing Policy and Procedure” and a “Whistleblowing Privacy Notice” in accordance with the EU General Data Protection Regulation.

HUNGARY

The Directive has not yet been implemented in Hungary. Up to now there has been no legislative amendments proposed or been available for the public.

However, since 2013 there is a possibility for entities of the private sector to introduce and use whistleblower system as per by Act CLXV of 2013 regarding complaints and reports serving public interest ("Act"). Namely, this Act has already obliged the Hungarian state organs and municipality bodies to set up a whistleblower system, while in the private sector setting up such a system has been provided only as an option. The Act regulates how to set up a whistleblower system by an entity of the private sector, who opted to have such system and how to handle complaints in such a case. In this overview we focus on the rules for the entities of the private sector.

The regulations of the Act meet some of the requirements of the Whistleblower Directive, but to achieve full compliance yet the amendment of the Act is essential.

As per the Act, the whistleblowers are already protected to the extent that any measure adversely affecting a whistleblower which is taken as a result of a whistleblowing shall be unlawful, unless the whistleblower acted in bad faith and provided false information of a decisive nature.

The possible areas of whistleblowing are not specified as purely the violations of EU law or local law due to the fact that the Act concerns the violation of any internal rule/code of conduct or law. The protection concept of the act provides that the employer in the interests of its lawful and prudent operation may define internal rules/codes of conduct protecting public interest or important private interest. Consequently the contractors and/or persons having a legitimate interest in making a report may indicate any violations not only of the aforementioned internal rules/code of conduct but also of any law.

In case an employer chooses to operate a whistleblowing system, it shall publish detailed information in Hungarian on the operation of the whistleblowing system and the whistleblowing procedure on its website.

Regarding the reporting procedure the Act sets minimal requirements. Namely, the whistleblowing system should be designed in such a way that the person of the non-anonymous notifier cannot be known to anyone other than the investigators of the report. Investigators of the report must keep confidential the information concerning the content of the notification and the persons involved in the notification until the conclusion of the investigation and may not share it with any other department of the employment organization or nor with his co-worker. The employment organization shall investigate the notification in accordance with the procedure specified by it and shall inform the notifier of the results of the investigation and of the measures taken. An attorney-at-law or another external organization may also be trusted to assist in the receiving and investigation of reports.

The employer should inform the whistleblower within the shortest possible time from the date of his/her report, up to a maximum of 30 days, with exceptions only possible in particularly justified cases and after informing the whistleblower thereof.

Investigating of the report may be waived in the cases, that the report was made without disclosing the reporting person's identity, the applicant repeated its application with the same content as the previous application, or the report was made by the notifier six months after becoming aware of the act or omission complained of.

If, due to the conduct which was reported, it is justified to initiate criminal proceedings on the basis of the investigation, measures shall be taken to file a criminal report. If the conduct included in the report is not a criminal offense on the basis of the investigation but violates the internal rules/code of conduct specified by the employment organization, the employer may take action against the employee in accordance with the rules applicable to the employment relationship.

If, on the basis of the investigation, the notification is unfounded or no further action is required, the data relating to the notification shall be deleted within 60 days of the completion of the investigation. If action is taken on the basis of the investigation, the data relating to the report may be processed until the final closure of the procedures initiated based on the report.

Finally, we note that since the operation of a whistleblowing system is optional under the effective Hungarian legislation and the Whistleblower Directive has not yet been implemented. Therefore, in principle, under national law there are no legal consequences for employers who don't have a whistleblowing system.

In case an employer has a whistleblowing system but breaches its obligation to protect the whistleblower then the employer's civil law liability can be triggered and it shall be liable to the damage caused to the whistleblower.

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ITALY

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On April 23rd, 2021 Law no. 53/2021 (the so-called European delegation law) was published for the implementation of European directives and the adaptation of national legislation to various EU Regulations but currently the Legislative Decree implementing EU Directive 2019/1937 regarding the protection of whistleblowers "who report breaches of Union law" has not yet been approved by the Government and published.

Law no. 53/2021 states that in the implementation of the legislative procedure the Government must observe the following specific principles and guidelines: to amend the current legislation on the protection of the authors of complaints of violations they have become aware of during a public or private employment relationship to comply with the Directive's requirements; ensure compliance with existing rules by providing a high level of protection and oversight for the individuals mentioned in letter a), making any needed abrogation, and adopting the necessary transitory rules and use the option set out in the Directive, which allows for the introduction or maintenance of provisions that are more useful for the rights of the persons reporting the violation and those indicated in the Directive, to ensure the highest level of protection and preservation of those persons.

Whistleblowing is currently regulated in Italy by Law 179/2017, which provided new safeguards for those who disclose irregularities or crimes adopting for the private sector the Legislative Decree No. 231/2001 related to the administrative liability of corporations for offenses and their prevention through the so-called "Law 231 organizational model".

As a result, if a private corporation has implemented or plans to apply its own so called "Organizational model Law no. 231", it must also establish a reporting system and ensure whistleblower protection.

The whistleblowing policy must in private companies should include one or more channels (so-called whistleblowing channels) by which directors, managers, and employees can disclose detailed claims of illegal activity based on precise and consistent facts that they have become aware of as a product of their functions.
The whistleblowing policy should also include at least one alternative reporting channel appropriate for ensuring the anonymity of the reporting person's identity using digital procedures and the prohibition of direct or indirect discriminatory actions against the whistleblower including the dismissal.

Last but not least, those who violate the whistleblower protection provisions, as well as those who make complaints that turn out to be untrue with malice or gross negligence, will face sanctions as provided for criminal and civil laws.

Specific regulations are also provided for banking sector, anti-money laundering regulations, financial activity, "market abuse" and insurance sector.

In other words, according to the regulations in force in the private sector, measures to protect whistleblowers are currently applied only when the entity has voluntarily decided to adopt and implement a Law 231/2001 organizational model in which whistleblower are protected for reporting both violations of internal and European laws: as an EU Member State and the supremacy of EU law, whistleblowers should report violations both on an EU and on a national level.
As written above, the mentioned channels of whistleblowing must also guarantee the confidentiality of the identity of the reporter in the handling of the report, in accordance with the current legislation on confidentiality and protection of personal data.

There are no specific penalties for employers who fail to implement the reporting structure under current legislation.

If, however, the organizational model provided for by Law 231/2001 does not include an adequate system of reporting offences by employees, the employer is subject to the liability provided for companies for offences committed by directors, managers, or employees to the benefit or in the name of the company.
The violation or bypassing of the model or procedures will expose, or may potentially expose, the employer as physical persons to criminal liability and the company itself to serious administrative penalties (as pecuniary sanctions, disqualification sanctions, confiscation or publication of the sentence of conviction).

As far as the public sector is concerned, the recipients of the reports are the Responsible for the Prevention of Corruption and Transparency (RPCT), or the ANAC (National Anticorruption Authority) if the reported fact directly concerns this last one.

Unlike in public sector, the recipient of reports in the private sector is not identified in such a specific way, leaving it up to the corporation to identify the person (or body) responsible for receiving and processing the report within the framework of structuring a system of controls and adequate information flows.

LIECHTENSTEIN

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Although Liechtenstein is not a member country of the European Union (EU), it is a member country of the European Economic Area (EEA). The EEA Agreement specifies that membership is open to member states either of the EU or of the EFTA. EFTA states that are party to the EEA Agreement participate in the EU's internal market without being members of the EU or the European Union Customs Union. They adopt most EU legislation concerning the single market, with notable exclusions including laws regarding the Common Agricultural Policy and Common Fisheries Policy. The EEA's "decision-shaping" processes enable EEA EFTA member states to influence and contribute to new EEA policy and legislation from an early stage.

The Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23th, 2019 on the protection of persons who report breaches of Union law ("EU Whistleblower Directive") has been adopted into the EEA Agreement and will apply to Liechtenstein. The EEA adoption process is currently still ongoing, and a concrete adoption date is not yet foreseeable.

Under the existing Liechtenstein legislation and case law and before the implementation of the corresponding European legislation, the term whistleblowing means the phenomenon whereby an employee in a company is allowed to report wrongdoing to internal bodies and, under certain conditions, also to external third parties, e.g., authorities or the media. According to the Liechtenstein understanding, a "whistleblower" is an employee who uncovers serious abuses in his work environment and acts primarily out of altruistic motives. The abuses may be misconduct by employees in the sense of criminally relevant conduct. However, other misdevelopments or misconduct in the work environment that are not relevant under criminal law can also be uncovered. The fundamental right affected is usually the freedom of expression.

Whistleblowing cases, real or alleged, have recently made the headlines in Liechtenstein. The case of a doctor at the Liechtenstein National Hospital which the Liechtenstein Constitutional Court had to rule on in its decision of September 3rd, 2018 (StGH 2018/74) and which must be seen as the Liechtenstein leading case on whistleblowing:

- A hospital doctor who points out what he considers to be serious abuses (here: suspicion of active euthanasia) and is subsequently dismissed without notice is a so-called whistleblower whose freedom of expression is affected by the dismissal.
- The relevant norms of contract law are to be interpreted in the sense of indirect third-party effect in the light of this fundamental right in conformity with the constitution.
- Those who disseminate information must, in view of the duties and responsibilities that the exercise of freedom of expression entails, carefully examine whether the information is accurate and reliable.
- Particularly in view of the seriousness of the accusations made and the consequences for all parties involved in the case of public disclosure, the highest standards had to be applied to the unauthorized action of the complainant. Because an inspection of the paper file (instead of only the incomplete electronic file, as the complainant had done) would have confirmed the incorrectness of the suspicion, the complainant had acted recklessly and could not invoke freedom of expression.

In a second leading case on whistleblowing (StGH 2019/27), the Liechtenstein Constitutional Court had to decide on May 13th, 2019 a matter where a complainant argued that the granting of administrative assistance was contrary to public policy because the information on which the request for administrative assistance was based had been obtained on the basis of information provided by a whistleblower and thus by means of data theft and came to the conclusion:

Administrative assistance in tax matters can only be refused due to the involvement of a whistleblower if the request would be contrary to the principle of good faith under international law; for example, if the requesting state buys stolen data in order to subsequently use it for an administrative assistance procedure or if the requesting state has assured the requested state that it will not use stolen information for an administrative assistance request.

In general, it can be said that the Liechtenstein legal situation on whistleblowing is still in its infancy and is slowly developing, whereby it is now necessary to wait and see how exactly the European law directive will be implemented into Liechtenstein national law. It is still too early to make any predictions here.

MOLDOVA

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The Republic of Moldova is not an EU member and the EU Directives apply only if they are properly transposed in the national law. The Whistleblower Directive has not been transposed yet. However, the whistleblowers enjoy protection in Moldova under the Law on Whistleblowers, effective as from 2018. This law regulates the disclosure procedure of the illegal practice within the public and private entities, the rights and protection granted to the whistleblowers, the obligations of the employers and the jurisdiction of the authorities to examine such a disclosure and protect the whistleblowers.

The law defines the whistleblowers as individuals who entered into an employment, civil, volunteer or internship agreement in the last 12 months with an employer and reporting corruption acts, environmental and human rights violations as well other misconduct that threats or damages the public interest. Only the information disclosed in bona fide and about which the whistleblowers have the reasonable cause to believe that it is true will benefit from the relevant legal protection.

Whistleblowing is internal (communicated to the employer), external (communicated to the authorities) or public. The disclosure of the illegal practice shall be made by the whistleblowers in written form, being signed in hard copy by the employee or submitted via the online disclosure system. Whistleblowers are also entitled to communicate the illegal practice by phone to the anticorruption hotlines of the employer or the competent authorities. There are special pre-approved templates to be used by the employees or by the telephone operators for the purpose of whistleblowing.

The internal whistleblowing represents the right and not the obligation of the employees, except for the civil servants who shall report inappropriate influences and attempts of the corruption acts.

Pursuant to the governmental rules implementing the Law on Whistleblowers, the internal channels for communicating disclosures of the illegal practices are mandatory only for the large and medium-sized entities. The employees of micro and small entities will be provided with the legal guarantees for protection of the whistleblowers in case of the external or public whistleblowing.

In order to comply with aforementioned rules, the Moldovan employers shall put in place internal regulations on whistleblowing and appoint the responsible employee(s) or department to handle these issues and keep the registry of disclosing the illegal practice within the company.

The disclosed information shall be examined by the employer within 30 day-period that can be extended for another 30 days. The employees are granted the whistleblower status and related legal guarantees after their reports are duly registered and provided that the disclosed information refers to the activity of their employer. The confidentiality of the whistleblower's identity is a must, unless the employees decide otherwise. The terms and conditions to examine the disclosed information will be different if, based on the disclosed information, the proceedings are to be commenced according to the Moldovan Code of Contraventions or Criminal Code. In all cases, the employees shall be informed when are granted or refused the status of the whistleblower and about the outcome of examination their reports.

The employees may disregard the internal whistleblowing procedure and make an external one, for which the Moldovan Anticorruption Center is in charge, when: (1) they believe that the employer could be involved in the disclosed illegal practice; (2) the confidentiality of their personal data could be violated; (3) there is the risk that the evidence could be lost or destroyed; (4) the employer did not register their disclosure or failed to inform them about the outcome of examination in due time.

The confidentiality duty stipulated in the agreement with the employer cannot restrain the employee to publicly disclose an illegal practice.

The retaliation for whistleblowing is not allowed. Retaliation means any form of reprisal, pressure, disadvantage or discrimination of the employees at the workplace in connection with or arising from their disclosure of illegal practice and includes, but is not limited to, dismissal, suspension of the employment, demotion, refusal to promotion or training, harassment, etc.

Whistleblowers who are subject to retaliation have the right to ask for the legal protection of the employer (in case of the internal disclosure) or of the Moldovan Ombudsman (in case of the external or public disclosure). In this regard, the legal guarantees for the whistleblowers will consist of their transfer to other workplace in order to exclude or limit the influence of the person(s) who applied the retaliation for whistleblowing, annulment of the retaliation measures and decisions, disciplinary sanctions for retaliation or inappropriate legal protection of the whistleblower, compensation of the pecuniary damage and moral loss caused to the whistleblower, etc.

Violation of the Law on Whistleblowers by the employer or its representative(s), in particular, the failure to implement the internal reporting channels and whistleblowing regulations, the disclosure of the whistleblower's identity, the retaliation, will be qualified as disciplinary actions, contraventions or crimes and sanctioned accordingly.

NORTH MACEDONIA

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The Whistleblower Directive has not been implemented in the national legislation of North Macedonia since North Macedonia is not EU member. However, the legal protection of the whistleblowers is guaranteed with the Law on Whistleblowers Protection, adopted in 2015, and its content is in a wide extent in accordance with the Whistleblower Directive.

According to the Law, under protected reporting is understood reporting or disclosure which conveys a reasonable suspicion or knowledge that a punishable, unethical or other illegal or impermissible act has been committed, is being committed or is likely to be committed, or endangers the public interest. The protection of whistleblowers is stipulated for both, public and private sector.

The Law prescribes three types of protected reporting i.e., protected internal reporting, protected external reporting and protected public reporting, which should be done anonymously or confidentially, with good intentions and based on reasonable assurance at the time of reporting that the information contained in the report is true. In addition, the Law guarantees judicial protection of whistleblowers, damages and protection of the identity and the confidentiality.

The internal structure that an employer must have in relation to protected reporting depends on the number of its employees. Namely, only the employer who employs at least ten persons is obliged to adopt an internal act to regulate the procedure of protected internal reporting and also to appoint an authorized person for protected internal reporting. The internal act must be made publicly available to all employees at the employer. If there is no appointed authorized person for protected reporting, then the reporting can be done to the responsible person in the legal entity.

Although the reporting procedure is mainly subject to regulation of the internal act of the employer, the Law sets the basic framework for the manner of reporting. In particular, the procedure of internal reporting begins with the submission of the report to the authorized person by the employer. The report can be given orally on minutes or in writing to the authorized person in the legal entity in which there is a suspicion or knowledge that a criminal offense has been committed, is being committed or will be committed. The authorized person is obliged to act upon the submitted report according to the procedure prescribed in the internal act, to protect the personal data of the whistleblower, and to inform the whistleblower for the undertaken measures in regard to the protected reporting without delay, and no later than 15 days from the day of receipt of the report.

Beside the protected internal reporting, the whistleblower can also make a protected external reporting in cases when the reporting is directly or indirectly directed against the manager of the legal entity, when the whistleblower does not receive information on the undertaken measures in relation to the report in a period of 15 days of the receipt of the report or when no measures have been undertaken or when the whistleblower is not satisfied with the measures. The protected external reporting can also be done orally on minutes or in writing to the authorized person. After the protected external reporting, the institutions i.e., the legal entities to which the whistleblower has made a protected external report are obliged within their competencies to act upon the report, to protect the personal data of the whistleblower, and to inform him about the undertaken measures without delay, and no later than 15 days from the day of receipt of the report. In addition, the institution or the legal entity to which the protected external report has been submitted is obliged at the request of the whistleblower to give a notification on the course and actions undertaken after the report, as well as to enable the whistleblower to inspect the case file and after the completion of the procedure to inform the whistleblower of the outcome of the procedure.

The whistleblower can also make a protected reporting by making publicly available information in cases when the protected internal and external reporting were disabled due to unestablished procedure, when the whistleblower did not receive information on undertaken measures in the legally determined deadline and when no measures have been taken or there is an easily identifiable danger of destruction of evidence or concealment of liability. A whistleblower who performs protected public reporting must not make publicly available the personal data of the entity that are not relevant for the protected reporting, the data or information that according to law are considered classified information, the data or information that endanger the conduct of criminal, misdemeanor or civil proceedings, as well as data, i.e., information whose public availability violates or endangers the national security, the defense of the independence or the territorial integrity of the country. A whistleblower who will make a report by making publicly available information contrary to the Law, will not have the right to protection.

The disclosure or enabling the disclosure of the identity of a whistleblower without his consent is prohibited, except when required by a court decision when it is necessary to conduct a procedure before a competent authority. The person authorized to receive reports from whistleblowers is obliged to protect the data on the whistleblower, unless the whistleblower agrees to the disclosure of those data, as well as during the receipt of the information to inform the whistleblower that his identity can be revealed to the competent body. In addition, any person who finds out the data of the whistleblower is obliged to protect it. In case of disclosure of the identity of the whistleblower on the basis of a court decision, the authorized person is obliged to inform the whistleblower before the disclosure of the identity. However, the personal data of the whistleblower cannot be disclosed in front of the indicated person in the report.

An employer who does not protect whistleblowers in the manner prescribed by law may be fined up to EUR 4.000,00 in denar countervalue, and the responsible person of the employer may be fined up to EUR 1.000,00 in denar countervalue. As noted above, if the employer has not established protected internal reporting, the whistleblower can directly initiate protected external reporting.

The competent bodies to receive protected external reports are the Ministry of Interior, the Public Prosecutor's Office, the State Commission for Prevention of Corruption and the Ombudsman of the Republic of North Macedonia.

POLAND

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As of December 17th, 2021, the Whistleblower Directive has not yet been implemented to the Polish law. The draft legislation has already been published and submitted to consultations. As the period of the consultations has expired, we believe the new version of the bill will be published soon.

According to the current version of the bill, whistleblowers will be protected for reporting breaches of the EU law and certain national laws with reference to: public procurements, financial services, products and markets, anti-money laundering and terrorism financing, product safety and compliance with requirements, transport safety, environmental protection, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, privacy and personal data protection, security of the network and information systems, financial interests of the European Union, the internal market of the European Union. In this regard, a breach is recognized as both: an unlawful action or omission as well as an action or omission circumventing the law. Moreover, employers will be in a position to decide whether they want to extend the protection to their internal regulations, such as a code of ethics. That said, the protection of whistleblowers is to go beyond the Directive, especially if the employer decides to include internal documents in the system.

Notwithstanding the above, there are provisions regarding whistleblowers within sectoral legislation. For instance, in accordance with the Polish Banking Law, banks have to establish a management system which should include procedures for anonymous reporting of infringements of the law and procedures and ethical standards adopted by the bank. The reporting person shall be protected against actions of repressive nature, discrimination or other kinds of unfair treatment. Similar provisions are currently implemented in the Polish Anti-Money Laundering Act. The Act provides that the obliged institutions (entities responsible for implementing AML procedures) shall develop and implement an internal procedure for anonymous reporting of actual or potential breaches of the law governing anti-money laundering and terrorism financing by employees or other persons performing activities for an obliged institution. As in the Banking Law, a reporting person is protected against actions of repressive nature, actions which lead to deterioration of their legal or actual situation, or which involve threats.

Some aspects of whistleblower protection are currently established in the Polish Labor Code, which forbids mobbing and discrimination on any account (i.e., including whistleblowing). Also, in some cases (e.g., if aimed at securing legitimate interest protected by the law), a trade secret infringement is not recognized as an act of unfair competition. Nevertheless, these solutions do not offer full whistleblower protection as required by the Directive.

According to the bill, whistleblowers in Poland will be protected for reporting a breach of law provided that the reporting person has reasonable grounds to believe that the infringement-related information which was reported or publicly disclosed was true at the time of its reporting or disclosure to the public, and that such information fell within the scope of the whistleblower protection law.

The Act will apply to anonymous reporting of breaches of law only in situations where the possibility of anonymous reporting is provided for in the internal reporting regulations adopted by the employer, specifying the internal procedure for reporting breaches of law or the procedure for reporting breaches of law to a public authority.

The bill provides that an employer having at least 50 employees is obliged to establish internal reporting bylaws which set out the internal procedure for reporting breaches of the law and for taking follow-up measures. Employers having less than 50 employees may establish their internal reporting bylaws as an option. The obligatory and optional elements of the internal procedure are listed in the bill. The legislator envisaged the obligation to consult the wording of the procedure with an internal union organization or employees' representatives if no trade union is in operation at the employer's establishment. The employer will also be obliged to familiarize the employees with the internal reporting regulations before they start work. The internal procedure will take effect 2 weeks after it is communicated to the employees.

Reports can be filed electronically. However, the bill provides that written and oral reporting must be possible. Oral reporting may be made by phone or other means of voice communication and, if requested by the reporting person, during a direct meeting arranged within 7 days of receipt of the report. The employer shall use technical and organizational solutions which ensure that the reporting person's personal data is stored separately from the document or another data-recording medium which contains the report, including, where appropriate, removal of the reporting person's personal details from the document or another data-recording medium immediately after its receipt.

The bill provides for a fine (from PLN 100,00 to PLN 1,080,000 i.e., from approx. EUR 22,00 to EUR 237.500,00), restriction of liberty or imprisonment for up to 3 years for anyone who: (1) hinders reporting a breach; (2) takes retaliatory measures against the person who has reported or publicly disclosed a breach; (3) does not comply with the obligation of non-disclosure of the identity of the reporting person (4) has reported or disclosed false information to the public; (5) contrary to the provisions of the Act, has not established an internal procedure for reporting breaches or acts in breach of the procedure.

In Poland it is the Ombudsman that acts as the central body competent to receive reports of breaches, give feedback and follow up on external reports, and the President of the Office of Competition and Consumer Protection that acts as the public body in respect of reporting breaches of competition and consumer protection rules. Moreover, other authorities are also competent to receive external reports of breaches within the area of their respective activities.

PORTUGAL

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Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 23th, 2019, on the protection of persons who report breaches of Union law was very recently implemented in Portugal by Law 93/2021, onf December 20th, 2021, coming into force after a transitional period of 180 days, onin June June 18,th, 2022.

Companies, including the State and other public corporations, employing 50 or more employees will be required to establish internal reporting channels.

The new law applies to all acts or omissions breaching Union law within the following areas: public procurement;, financial services, products and markets, prevention of money laundering and terrorist financing, product safety and compliance, transport safety, protection of the environment, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data, and security of network and information systems.

Whistleblowing or public disclosure may concern to violations that are being committed or whose commission can be foreseen, as well as to attempts to hide such offenses.

According to the law, a whistleblower is a natural person who reports or publicly discloses a breach based on information obtained during the respective professional activity, whatever the nature of that activity and of the sector in which it is carried out.

Under the current legislations, the concept of whistleblowers includes:includes employees in the private, public, or social sector, service providers, contractors, subcontractors, and suppliers, as well as any persons acting under their supervision and direction, the holders of shares and persons belonging to administrative or management bodies or supervisory bodies of legal persons, including non-executive members, executives, and paid or unpaid interns and volunteers.

We note that before the transposition of the Directive by the recent Portuguese law, the only protection of whistleblowers was verified in the scope of purely labor relations, and, in some very specific situations, regarding criminal proceedings, in what concerns to witnesses protection mainly within organized crime.

Differently, the new law on the protection of whistleblowers expressly states that these shall benefit from the respective protection if, in good faith and having good reason to believe that the information is correct and real at the time of the report or public disclosure, denounces or publicly discloses a breach. Though, in what concerns the ways of report and public disclosure, it is relevant to say that the reports shall be submitted by the whistleblower through the internal or external channels, or publicly disclosed.

Hence, as referred above, legal persons, including the State and other public companies, employing 50 or more employees will be required to establish internal reporting channels allowing secure submission and tracking of the reports, ensuring the completeness, integrity and preservation of the complaints, as well as the confidentiality of the identity or anonymity of the complainants and also the confidentiality of the identity of third parties eventually named in the report, and, finally, to prevent the access by unauthorized persons. These channels are internally operated by dedicated persons or services, though they can alall be operated externally strictly concerning the reception of reports. Finally, the internal channels must comply with the Portuguese data protection legal regime and prevent conflicts of interest.

Furthermore, the whistleblower must be given the possibility to report both in writing and orally and shall regularly receive detailed follow-ups and feedback.

Concerning external reports, the law establishes some public authorities competent to receive, follow-up and give feedback on reports in accordance with the respective powers and public duties: the Public Prosecutor, criminal police bodies, the Bank of Portugal, independent administrative authorities, public institutes, general inspections and similar entities, and other central services of the State direct administration endowed with administrative autonomy, and finally local authorities and public associations.

In addition, in cases where there is no competent authority to know about the object of the complaint, or in cases that the complaint involves the above said competent authorities, it must be reported to the recently established “National Anti-Corruption Mechanism” and, in the case that this is the denounced entity, to the Public Prosecutor, which will file a criminal investigation whenever the described facts in the complaint are typified as crime(s).

Furthermore, the above said competent authorities establish external whistleblowing channels, independent and autonomous of other communication channels, to receive and follow up on complaints, which ensure the completeness, integrity, and confidentiality of the complaint and prevent access to unauthorized persons. The required entities and competent authorities responsible for receiving and handling complaints under this law, shall keep a record of the complaints received and retain it for at least five years.

About the confidentiality of both internal and external whistleblowing mechanisms the law states that the identity of the whistleblower and the information that directly or indirectly allows the respective identity, it is confidential and restricted to the people responsible for receiving the reports, as identity only can be revealed in cases of a legal obligation or a court decision.

Whistleblowers are at last entitled to legal protection, benefiting in general terms from the regime of witness protection measures in criminal proceedings.

At last, there are specific several penalties for employers who fail to implement the mechanisms and internal procedures foreseen in the law to protect whistleblowers. Following this, the law foresees very serious administrative offenses such as the blocking of a compliant, retaliatory acts, and failing to comply with the duty of confidentiality and publicly disclosing of false information. These offences are punishable by fines between EUR€ 1.000,00 and EUR€ 25.000,00, or between EUR€ 10.000,00 and EUR€ 250.000,00 depending on whether the offender is a natural or a legal person.

AlsoAlso, as serious administrative offenses are some specific infringements related to the non-implementation of internal and external reporting channels, failing in its implementation, failing on its management or in reporting procedures, lack of training of the responsible personal, etc. These offences are punishable by penalties varying between EUR€ 500,00 and €EUR 12.500,00, or between EUR€ 1.000,00 and €EUR 125.000,00, depending on whether the offender is a natural or a legal person.

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ROMANIA

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The Whistleblower Directive (EU) 2019/1937 has not been transposed yet into the Romanian legislation. Currently, there is a draft law, to be debated and adopted by the Romanian Parliament, which would presumably enter into force at the beginning of next year, namely "Law on the Protection of Whistleblowers in the Public Interest" (hereinafter "Draft Law").

Romania currently has partial whistleblowing protection in place since 2004[], but only for those working in the public sector. Law no. 571/2004 establishes a series of measures to protect whistleblowers concerning relative presumption of good faith, publicity of the investigations performed by the disciplinary committees, protection of the identity of whistleblowers, as well as judicial protection. The Draft Law, however, will replace the existing regulation, and will turn into the general applicable legislation in facilitating and managing reports on breaches, both in public and private sector.

Unlike the existing legislation, the Draft Law extends the protection of whistleblowers to the private sector. All companies with at least 50 employees will have the obligation, as per the provisions of the Draft Law, to identify and establish internal reporting channels, by setting up reporting policies that must be brought to the attention of employees. Companies having 50 to 249 employees may group together and use or share resources in receiving reports of violations of the law, as well as in subsequent actions, and are expected to comply with the envisaged provisions only as of January 1st, 2023. Companies with less than 50 employees are exempted from the obligation to set up internal reporting channels; employees of these entities may, however, report externally, directly to the competent national authorities.

The Draft Law provides protection of the whistleblowers allowing a wide range of breaches to report, such as breaches of any law, including non-compliance with ethical and professional rules, should the breach qualify as disciplinary misconduct, contravention, or criminal offence.

Among the obligations introduced by the Draft Law, private entities would be obliged to designate a person, department or third party with responsibilities for the receipt, registration, examination, subsequent action, and settlement of reports, who must act impartially and who must enjoy independence in the performance of those duties. The Draft Law also provides that the internal reporting and follow-up procedure involve the design, establishment, and management of the means in which reports are received, as to protect confidentiality of the identity of the whistleblower and of any third party mentioned in the report and to prevent access to reporting by unauthorized personnel.

Whistleblowers are encouraged to first use the internal channels within the entity in which they operate before addressing external reporting channels or making a public disclosure. The internal reporting channels should enable employees to report in writing (on paper or through electronic means) or orally (by phone or other voice messaging systems) or, upon request of the whistleblower, by means of physical meetings. Public and private entities should establish mechanisms to ensure the anonymity and protection of whistleblowers' report and, also, comply with the provisions of data protection legislation while processing personal data within the whistleblowing procedure.

In terms of procedure, the designated person is obliged to receive, register, and send the whistleblower the confirmation of the receipt of the report within maximum seven calendar days from its receipt. Further to the investigation, the designated person has the obligation to inform the whistleblower about the status of subsequent actions, within a maximum of three months from the date of confirmation of receipt or, in case the receipt of the report is not confirmed, from the expiry of the seven-day period, as well as, whenever there are developments in the subsequent actions, unless the information could jeopardize their completion. In addition, the designated person shall keep the competent corporate body informed on the means of solving the reporting.

Additionally, the Draft Law provides that the storage period of the whistleblowing reports and settlement resolution should be centralized in a register to be kept for a period of five years. After the expiration of the five-year storage period, they are destroyed, regardless of the place where they are kept.

Whistleblowers enjoy confidentiality and anti-retaliation protection under the Draft Law, and, to this extent, the person designated to handle reports must not reveal the whistleblower's identity. The designated person is exempted from this obligation if the whistleblower expressly consented to the disclosure of his/her identity, if there is an obligation imposed by the law, provided the whistleblower is informed beforehand, in writing, of such disclosure and the reasons that led to the disclosure (yet, the obligation to inform the whistleblower does not apply if the information would jeopardize the investigation or legal proceedings), and, finally, if the whistleblower has intentionally revealed his/her identity in the context of public disclosure.

Also, in shaping the mechanism of protection of whistleblowers, this Draft Law establishes the prohibition of reprisals against whistleblowers, and it enshrines a non-exhaustive list of many forms that retaliation can take. Disposing a measure in retaliation for reporting or of public disclosure shall constitute a contravention sanctioned with fine up to RON 30,000 (approx. EUR 6,060). Also, any violation of the provisions of the Draft Law would entail, as the case may be, civil, disciplinary, administrative or criminal liability. The administrative fines set out by the Draft Law for companies failing to comply with the new whistleblowers' legislation range between RON 1,500 (approx. EUR 300) and RON 30,000 (approx. EUR 6,060).

As per the Draft Law, the competent body for external reporting of irregularities is the National Agency for Integrity. However, at the same time, the Draft Law requires the National Agency for Integrity to redirect all whistleblowers reports if the Agency ascertains that it does not hold competencies to solve the reports or if such competences belong to other supervisory and regulatory authorities.

SERBIA

The Whistleblower Directive has not been implemented in the national legislation of Serbia since Serbia is not EU/EEA member.

In Serbia protection of whistleblowers is governed under the Law on Protection of Whistleblowers ("Official Herald RoS" no. 128/2014) (hereinafter: "Law"). The Law was adopted on November 25th, 2014, entered into force on December 4th, 2014, and its implementation started on June 5th, 2015. The Law determines whistleblowing, whistleblowing procedure, whistleblower's rights, obligations of the governmental bodies, other bodies and organizations, as well as obligations of legal entities and natural persons regarding whistleblowing and protection of whistleblowers. The goal of the Law is to motivate potential whistleblowers to disclose information with respect to the corruption in public and private sector by providing of the state protection which is guaranteed and suppressing causing of the harmful consequences, respectively to eliminate the same if it occurs with respect to the whistleblowing.

The whistleblower enjoys protection under the law, if he or she discloses the information about the violation of regulations to the employer, other authorized body or the public and, at the time of whistleblowing, a person of average knowledge and experience would believe in the truthfulness of the information as would the whistleblower.

According to the law it is forbidden to take harmful action, whereby harmful action is any act or omission in connection with the agitation which endangers or violates the right of the whistleblower or the person entitled to protection as a whistleblower, or which puts those persons at a disadvantage. Also, the provision of a general act or an individual act attempting to prevent whistleblowing is void.

On the other hand, the Whistleblower is not protected by the law if she or he abuses the provision for her or himself. An abuse is committed by a person who: 1) submits information that he knew was not true; 2) in addition to the request for action in relation to the information with which the whistleblowing is performed, seeks illegal benefit.

The whistleblower report contains data on violations of regulations as well as data to prevent large-scale damage and may include the whistleblower's signature and whistleblower information. The law does not specify the data in question. In practice, those are the data based on which whistleblower can be identified – name, surname, contact details etc. Nevertheless the employer and the authorized body are obliged to act on anonymous information notices, within their powers.

In principle, the whistleblower has the possibility to disclose the information internally, externally or publicly.

For internal whistleblowing, the law provides several obligations for employers who have more than ten employees. First of all, the employer must regulate the internal whistleblowing procedure through a general law and publish this law in a publicly accessible place and on its website. In addition, it must inform all employees in writing of the rights under this law and designate a person authorized to receive information and carry out procedures relating to whistleblowing. If the whistleblower contacts the employer, the employer has several obligations that must be followed. The employer must inform the whistleblower of the outcome of the procedure within 15 days of its conclusion. In addition, the employer must take measures to eliminate the identified irregularities related to the information. Within the scope of its powers, the employer must protect the whistleblower from harmful acts and take the necessary measures to stop the harmful acts and eliminate the consequences of the harmful acts. The identity of the anonymous whistleblower is protected, as the employer may not take measures to uncover the identity of the anonymous whistleblower.

In the event that the whistleblower does not wish to contact the employer, he or she may alternatively contact a competent public authority. "Competent public authority" is a body of the Republic of Serbia, territorial autonomy or a unit of local self-government or a holder of public authority competent to act on information that is used for alerting, in accordance with the law.

In case that the information does not entail classified information, it is up to the whistleblower whether he discloses the information internally or externally. If the information entails classified information, the whistleblower is obliged to first address the employer, and if the information refers to a person authorized to receive information and carry out procedures relating to whistleblowing, the information is submitted to the head of the employer. In the event that the employer did not act within 15 days on the information containing classified information, or if it did not respond or did not take appropriate measures within its competence, the whistleblower may contact the authorized body (external whistleblowing). Notwithstanding the above, in the event that the information relates to the head of the employer, the information shall be submitted to the authorized body (external whistleblowing). If the information contains classified information, the whistleblower may not alert the public, unless otherwise provided by law.

The public may be alerted without prior notification of the employer or the responsible agency only in very limited circumstances, such as imminent danger to life or public health. It should be mentioned that in case of disclosing information to the public, the whistleblower is obliged to respect the presumption of innocence of the accused and the right to protection of personal data, as well as not to jeopardize the course of the judicial proceedings.

If a legal case of whistleblowing exists, the employer may not disadvantage the whistleblower. The whistleblower is also not obliged to compensate for the damage caused by whistleblowing and has the right to judicial protection by filing an action for protection in relation to whistleblowing with the competent court within six months from the date on which the whistleblower became aware of the harmful act or within three years from the date on which the harmful act took place.

Employer's failure to fulfill the above listed duties represents misdemeanor for which the employer – the legal entity can be subject to monetary fine in the amount from RSD 50,000 to RSD 500,000 (app. EUR 424 to EUR 4,237), and for responsible person from RSD 10,000 to RSD 100,000 (app. EUR 85 to EUR 847).

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SLOVENIA

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The whistleblower Directive has not yet been transposed into Slovenian law. As far as the procedure is concerned, the draft law transposing the Directive has been in the phase of interministerial coordination since December 9th, 2021, which means that it has not yet been discussed in the Slovenian Parliament. Moreover, the legislative proposal has only now been made available to the public. The Ministry of Justice aims to implement the directive in spring 2022.

Regardless of the above, whistleblowers in Slovenia are protected with specific uncoordinated sectoral statues, which limit the definition of irregularities to certain areas and only cover certain types of persons. The most comprehensive of them all is Integrity and Prevention of Corruption Act (ZIntPK) which offers protection to employees in both public and private sector. It meets a number of international standards regarding whistleblower protection such as: principle of confidentiality, the reversal of burden of proof, the establishment of internal and external reporting channels, legal remedies of compensation for retaliation, the possibility of law enforcement, the possibility of assistance from an independent agency, and it sets out a general punitive-law framework defining penalties for retaliation against a whistleblower or disclosure of his/hers identity.

Some of the other specific statues such as Financial Instruments Market Act (ZTFI-1), Investment Funds and Management Companies Act (ZISDU-3) and Banking Law (ZBan-3) also allow employees to report infringements through internal and external reporting channels. They also share a common goal of protecting the whistleblower's identity and to protect them from retaliation.

The main disadvantage of said statues is (as stated above) that they only apply to specific definitions of irregularities. The Integrity and Prevention of Corruption Act does also not set the deadline for the deciding body (Commission for the Prevention of Corruption) to reach a decision whether an employee is to be granted the whistleblower status and it does not state clear conditions under which causation is established. Similarly, the other statues generally do not set the conditions under which a whistleblower is eligible for protection.

However, current protection of whistleblowers generally does not go beyond the Directive with a few exceptions. For example: In case of retaliation under the Integrity and Prevention of Corruption Act the whistleblower working in the public sector may be reassigned to another equal position. It also states that anyone (not only persons who report information obtained in the context of their work – related activities as per the Directive) may submit a report to a commission or other competent body on corrupt conduct in a state body, local community, public authority or other legal entity under public or private law or on the conduct of a natural person whom he believes has signs of corruption.

Most sector-specific laws do not refer to EU law, but only to violations of "regulations" or internal acts, but it can be assumed that this also applies to EU law. On the other hand, Financial Instruments Market Act (ZTFI-1) states that a financial sector entity shall set up an infringement notification system specifically for the Regulation 596/2014/EU which allows employees to report internally on infringements of the Regulation through independent reporting lines.

In the Slovenian legal system, the required reporting structure differs depending on the specific sectoral law. For example, the Integrity and Prevention of Corruption Act requires that the legal breaches are to be reported through external reporting channels to the Commission for the Prevention of Corruption. However, an internal reporting is only possible in the case of legal breaches and unethical conduct in the public sector.

On the other hand, the Investment Funds and Management Companies Act, Financial Instruments Market Act and Banking Law enable whistleblowers to report legal breaches using either one of the reporting channels. They also do not set more specific rules about the reporting structure. It is up to the employer to define the structure in more detail. In arranging the structure, the employer must only consider the legal requirement to ensure that employees report violations internally through independent reporting lines. The structure should allow for an easily accessible way of forwarding reports, including reporting on the findings of received reports and carried out inquiries.

Financial Instruments Market Act sets more detailed rules on the establishment of external canals. The Securities Market Agency is competent to receive reports of legal breaches. The Agency must determine the appropriate number of staff qualified to process applications and establish independent communication channels and application processing procedures, with information on application procedures being made public.

It should be noted, that there are no penalties or other consequences for employers who fail to implement the reporting structure under current legislation.

Moreover, under current legislation there is no one sole designated state authority that would be competent to receive external reports from all areas. For example the Commission for the Prevention of Corruption is capable of receiving external reports based on Integrity and Prevention of Corruption Act, the Bank of Slovenia on the basis of the Banking Law and the Securities Market Agency on the basis of Financial Instruments Market Act and Investment Funds and Management Companies Act.

SPAIN

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The Whistleblower Directive has not been implemented in Spain yet although some steps have been taken in that direction.

The Ministry of Justice opened months ago a public consultation process to gather the opinion of those potentially affected by the future regulation and the Council of Ministers approved on March 4th, 2022, at the proposal of the mentioned Ministry, the Preliminary Draft Law that will transpose the Whistleblower Directive. In any case, considering the rest of mandatory steps that need to be followed, it may take months before it exists in Spain a law to be applied.

From an employment perspective, until now, certain situations protected by the Directive were already included in some sectoral Spanish regulations or even in the case law linked to the protection of some fundamental rights (as integrity and equality) granted by the Spanish Constitution, as it is explained below. However, those national laws were not general and homogeneous enough to guarantee an effective protection of the whistleblowers.

Therefore, the European whistleblower protection will have important implications in Spain in several areas and will have a significant impact on both the public and private sectors.

As an example of these former rules related to whistleblowers protection, the Spanish Law of effective equality between men and women, implemented in 2007, imposed an obligation for employers to have a whistleblower channel to expose cases of sexual harassment to ensure safety at workplace.

This channel must be accessible to all employees as well as clear and easy to use, must maintain the confidentiality of the complainants and ought to have a reasonable response time (any kind of long delays in response) as well as a follow-up of the case. Different channel methods are possible, depending on the employer and its needs at any given time. Thus, it will be possible to channel the complaints through a specific e-mail address, a telephone extension or an internal application designed for this very purpose.

In addition, this Law provides indemnity against reprisals for whistleblowers in this type of harassment situation.

The infringement of the stipulations mentioned above are included in the Law on Infractions and Penalties of the Social Ambit and could imply penalties for the employers up to EUR 187.515 and accessory sanctions as the lost of benefits derived from the application of the employment programs and the temporary exclusion from access to such benefits.

Furthermore, the recent Supreme Court Sentence number 35/2020 of February 6th, 2020, repeatedly mentioned by the courts over the last year, is a pioneer in the justification and necessity of such whistleblowing channels after the Directive (even previously to its Spanish transposition) and recognizes anonymous whistleblowing as a valid source of investigation. In this sense, the Supreme Court establishes

"the Directive is justified by the recognition that whistleblowers are the most important channel for uncovering fraud offenses committed within organizations; and the main reason why people who become aware of criminal practices in their company or public entity do not report them is mainly because they do not feel sufficiently protected against possible reprisals from the entity whose infringements they are reporting".

Some Spanish employers have also implemented wider internal conduct guidelines and reporting systems, with the purpose of not only exposing violations related to sexual harassment, but also to whistleblow other kind of irregularities. There may be some cases, where these conduct guidelines shall be implemented voluntarily by the employers. Otherwise, it might be due to a mandatory provision, which is usually stated in the applicable sectoral Collective Bargaining Agreement.

As mentioned before, there is also traditional case law known as the "indemnity guarantee", which means that an employer is not able to adopt any kind of measure of reprisal against an employee after having filed a complaint against any member of the Company or interposed a legal suit or a claim before the labour inspector. On the contrary, might this action be carried out in reprisal by the employer, it shall be declared null and void. Therefore, additional compensation for moral damages in connection with the infringement of that fundamental right could be recognize to the employee if these damages are enough proved.

On the other hand, there is still no regulation in Spain creating a specific body to protect whistleblowers. As mentioned before, for the moment, the Labour Courts and Labour Inspection are those who provide this protection at the same time than protecting any other labour infringement, by filing a prior lawsuit or report. With regard to the internal company channels, this protection is usually assigned to an internal employee or body or to an external consultant, that will receive the reports carrying the information.

However, as it was said before, the Whistleblower Directive is not transposed yet in Spain into national law, so once it is, the specific competent authority would be designated, and the rest of pending matters will be developed.

SWEDEN

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The Swedish Parliament has adopted a new act, the “Protection of Persons Reporting Irregularities Act” (hereinafter: the “Whistleblowing Act”). The Whistleblowing Act came into force on December 17th, 2021. The Whistleblowing Act aims to implement the Whistleblowing Directive and is more extensive than the current Swedish act.

The mandatory introduction of whistleblowing functions will apply gradually depending on the size of the legal entity. The Whistleblowing Directive will be implemented gradually in accordance with the following:

- July 17th, 2022, all public employers (including municipalities and regions) with at least 50 employees and all private employers with at least 250 employees, will be required to have a whistleblowing function in place.
- December 17th, 2023, all private employers with 50–249 employees, will be required to have a whistleblowing function in place.

The Whistleblowing Act covers reporting of irregularities in violation of Union law or Swedish law and other irregularities in respect of which there is a public interest. Thus, it also covers violations of purely national law. Public interest may exist, for example, where it can be dangerous to use a product on the market or where tax revenues are squandered. Whistleblowing which only concerns the reported person’s own work or employment conditions is not, however, protected by the Whistleblowing Act unless it concerns very serious irregularities. The Whistleblowing Act covers not only the items listed in the Directive but also other irregularities that are of public interest. In most cases it will concern serious irregularities such as criminal activity where the statutory sanction includes a prison sentence or an otherwise comparable irregularity.

Comparable irregularities are such actions which constitute such qualified violations of standards and regulations, or shortcomings, that they may objectively be viewed as serious. Conflicts between employees, general dissatisfaction and similar conditions are not covered. Examples of irregularities that may constitute ‘comparable irregularities’, are human rights violations, corruption, risks to health and safety of employees or regulation in support of functioning markets such as regulations for financial markets.

However, since no exact standards for what constitutes ‘comparable irregularities’ exist, employees who report irregularities and initiate legal action in order to gain compensation for perceived retaliation from the employer may, to some extent, find that such protection is not offered. It is likely that it will prove difficult for the courts to establish exactly what constitutes a serious irregularity when the reported conditions are not also subject to criminal charges.

Employers with 50 or more employees will be required to establish internal reporting channels and procedures for reporting and follow-up. The Whistleblowing Act is relatively detailed in its description of the manner in which reporting channels are to be set up and the manner of following up on a report. For example, the whistleblower has to be given the possibility to report both in writing and orally and must regularly receive detailed follow-ups and feedback.
There must be independent and autonomous persons or units that receive the whistleblowing reports, maintain contact with the reporting person, and follow up and provide feedback to the reporting person. The whistleblowing function can be internal within the company, i.e. consist of persons employed by the employer, or be provided by a person or unit outside the company. If an external whistleblowing scheme provider is appointed normally persons both within the external whistleblowing scheme provider and persons employed by the employer will be included in the whistleblowing unit.

Deviations from the manner in which the reporting channels are to be designed may be implemented in collective bargaining agreements so long as the collective bargaining agreement respects the rights following from the Directive.

As regards employers who operate private businesses and have 50 – 249 employees, the reporting channels must be in place and applied commencing July 1st, 2023. As regards employers in the public sector and employers with over 249 employees, the system must be instead implemented commencing July 1st, 2022. Where no reporting channels have been established by the aforementioned dates, the supervisory authority may order the employer to fulfil the legal requirements subject to a fine. The Swedish Work Environment Authority will be the supervisory authority (see ordinance (2021:949) on protection for persons reporting irregularities – issued on November 2nd, 2021 by the Swedish government).

According to the Whistleblowing Act, employers are liable for damages if they expose an employee to reprisals, as a consequence of whistleblowing. Only the employer can be liable to damages; no liability will arise for the employee or anyone else.

Processing of personal data in contravention of the rules in the GDPR can attract penalties (Article 83 of the GDPR). The data subject has also a right to damages for harm and infringement of privacy caused by the fact that personal data has been processed in contravention of the GDPR (Article 82 of the GDPR). The Swedish Authority for Privacy Protection (Sw. Integritetsskyddsmyndigheten – IMY) is designated to be the supervisory authority under the GDPR. The task of IMY is to give advice and check that the legislation is complied with. Checks are mainly made by means of inspection.

The Whistleblowing Act distinguishes between internal and external whistleblowing mechanisms.

Article 7.2 in the Whistleblowing directive states that Member States shall encourage reporting through internal reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation. However, according to the Whistleblowing Act the whistleblower shall within his/her own discretion be free to choose to report directly to external reporting channels. This in case such an external channel exists for the issue at hand. The Swedish government has designated several authorities competent to receive information on breaches falling within the scope of the Whistleblowing Act.

As recipients of reports, the authorities designated as competent should have the necessary capacities and powers to ensure appropriate follow-up, including assessing the accuracy of the allegations made in the report and addressing the breaches reported by launching an internal enquiry, investigation, prosecution or action for recovery of funds, or other appropriate remedial action, in accordance with their mandate. Alternatively, those authorities should have the necessary powers to refer the report to another authority that should investigate the breach reported, while ensuring that there is appropriate follow-up by such authority. See further ordinance (2021:949) on protection for persons reporting irregularities – issued on November 2nd, 2021 by the Swedish government.

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SWITZERLAND

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Switzerland has not yet implemented any whistleblower law, as Swiss government has not yet approved any draft of legislation about the protection of whistleblowers. Even though over the years, Swiss government tried several times to introduce a law protecting whistleblowers but, unfortunately, all these attempts were in vain.

In fact, it was in 2007 when Swiss government first stared to discuss the protection of the whistleblowers, with the acceptance by the Swiss parliament of the Gysin motion called "Statutory Protection of whistleblowers from corruption". Shortly after, in 2008, the Swiss Federal Council presented a first pre-draft of the revised Swiss Code of Obligations (CO – RS 220) containing a whistleblowers' protection law. In 2010, the revision of the CO regarding whistleblowers and the sanctions on unjustified or abusive notice was officially opened. However, it was only in 2013 that the Swiss Federal Council submitted to the Swiss Council of State an official report on the CO's revision, which was accepted later in 2014 with only few changes. Nevertheless, in 2015, the Swiss National Council together with the Swiss Council of States strongly rejected the CO's revision proposal and gave further instruction to present an easier and clearer draft. Even though this rejection, the Swiss Federal council re-affirmed and renewed its intention to introduce a whistleblowing law. Few years later, in 2018, the Swiss Federal Council approved a new draft of the CO's revision, which maintained the main principles of the previous draft about the whistleblowing law. A year later, the Swiss National Council and the Swiss Council of States were called to vote on this new draft. The Swiss National Council decided to refuse it; meanwhile the Swiss Council of States approved it. Considering this disagreement, the National Council was called to vote again in 2020 where it confirmed its previous opinion and rejected it again. Finally, also this draft was definitely rejected and then there still is a lack on whistleblowing legislation. Consequently, a whistleblower law will not be implemented soon.

It is important to highlight the fact that since 2011 a whistleblowing regulation exists regarding the federal administration and organizations linked to it. Indeed, federal employees and external stakeholders must report any wrongdoing anonymously through a dedicated platform or directly to their superiors, prosecution authority or the Swiss Federal Audit Office (SFAO). The Federal Personnel Act (FPA – SR 172.220.1 – Art. 22a and Art. 34c) obliges employees to report any wrongdoing and it protects the employees from any repercussion.

By not being neither a member country of the European Union (EU) nor the European Economic Area (EEA), the Directive only affects Swiss companies who have branches or subsidiaries – with more than 250 employees – located in the EU. However, the threshold of 250 employees is not a guarantee because some countries might have implemented a stricter regulation, which takes into consideration a lower threshold of employees. This given that from 2023 the Directive will be mandatory for all those branches or subsidiaries with more than 50 employees. Companies that are part of the financial sector need to comply with the Directive or the regulation of the country they are operating in regardless of the number of employees. Therefore, all Swiss corporations' foreign branches or subsidiaries will need to create an internal whistleblowing system/channel through which employees can report any violation of the law and will need to guarantee protection to the whistleblowers. This means that these companies will need to comply with and deal with the rules of the country where they are located.

Thus, Swiss groups will be confronted with different standards and will need to comply with different regulations depending on which country they are located in. This generates an important difference for employees of Swiss groups because the establishments located in Switzerland are not obliged to offer a whistleblower system because in Switzerland there currently is no law about it. However, they can spontaneously offer a whistleblowing system and protection, but employees might not feel comfortable to blow the whistle, as they do not have the certainty of being protected due to the absence of a law. Moreover, Swiss companies will need to evaluate whether to implement a uniform whistleblowing system thorough all its establishments both in Switzerland and abroad.

It is also important to point out that the majority of large Swiss companies (71.2%) and slightly over half of Small Medium Enterprises (with 20-249 employees) have already implemented an office where whistleblowers can report the unlawful action that they have witnessed or learned. The main reasons why companies voluntarily implemented a whistleblower system are (i) the increase and strengthening of the corporate integrity and ethics (ii) the avoidance of potential financial damages and (iii) the fact that if something illegal happens, besides the main perpetrator, they might be held accountable as well for not implementing and taking all the possible preventive measures according to Art. 102 (2) of the Swiss Criminal Code (RS 311.0).

Nevertheless, often, employees do not clearly know to whom they can report unethical or illegal behavior without breaching any law, namely their fiduciary duty (Art. 321a (4) CO). Given that Swiss courts usually treat the disclosure of information to the public as a criminal offence as for example it might breach the banking secrecy (Art. 47 of the Banking Act) and the business or manufacturing secrecy (Art. 162 of the Criminal Code).

Since there is neither a law protecting whistleblowers nor a regulation on whistleblowing, it is the Swiss courts that decide on a case-by-case whether a report is justified and whether the subsequent termination of the employee who blew the whistle was lawful.

UKRAINE

Ukraine is not a member of the European Union and as such is not subject to the Whistleblower Directive.

As a matter of Ukrainian labor laws there are neither specific laws and regulations on whistleblowers regime, nor any laws and regulations which may have any direct or indirect connection with whistleblowers protection. We are not aware of any legislative initiatives which would implement the whistleblowers provisions to the Ukrainian labor laws.

Nonetheless, since the Ukrainian labor laws authorize employers providing additional as compared to statutory rights and benefits to their employees, it shall be possible to implement at the level of internal labor regulations a whistleblowers policy aiming at protecting labor rights and interests of whistleblowers.

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